IN THE HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

W.P. No. 2811 /2003

PETITIONER : SWADESH AGROTECH LIMITED
C -17, Parijat Commercial Complex,
E-5, Arera Colony, BHOPAL.

Through : Sanjeev Agrawal,
Director, S/o Shri V. K. Gupta,
Aged about 39 years,
R/o E- 4/ 137, Arera Colony,
BHOPAL

F. R. No. 26/3/03
Presented by Shri Vivek Sharma
dated 05.09.03

Vs

RESPONDENTS 1) STATE GOVERNMENT OF C.G.
Through : The Principal Secretary
& Agricultural Prod. Commissioner,
Deptt. of Animal Husbandry & Dairying,
D. K. Bhavan, Mantralaya,
Raipur.

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2) Director,
Directorate of Animal Husbandry &
Dairying, State of C.G.,
G. E. Road, Raipur.

3) M/s Walmik Engineers,
409, Mangalwar Peth,
510, Llyods Chamber,
Block -2, Barne Road,
PUNE.

4) M/s S C A Chemicals India Ltd.,
Plot no. 3 & 4, Block 7-B,
Nehrunagar (East),
BHILAI -400020

PETITION UNDER ARTICLE 226 / 227 OF CONSTITUTION OF INDIA

1. **Particulars of the Petitioner** :

   As given in the cause title.

2. **Particulars of the respondents**:

   As given in the cause title.

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HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.2811 of 2003

Swadesh Agrotech Limited

- Versus -

State Government of Chhattisgarh and three others

POST FOR ORDER ON 14TH FEBRUARY, 2005

Sd/-
L.C. Bhadoo
Judge

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HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.2811 of 2003

Swadesh Agrotech Limited

- Versus -

State Government of Chhattisgarh and three others

Present: -

Mr. Ravindra Shrivastava, Sr. Advocate with Mr. Vivek Sharma, Advocate: For the petitioner.

Mr. N.K. Agrawal, Dy. Advocate General: For the State/respondents No.1 & 2.

Mr. P.S. Koshy, Advocate: For respondent No.3.

Before: Hon'ble Mr. Justice L.C. Bhadoo

O R D E R

(Passed on 14th February, 2005)

1. By this writ petition under Article 226/227 of the Constitution of India, the petitioner has challenged the decision of respondent No.2 in awarding the contract to respondent No.3 for improvement, design, construction, supply, installation and commissioning of Dairy Plants at Raigarh, Ambikapur, Korea, Kawardha & Jashpur, and Chilling Centres at Bharatpur, Kunkuri & Bagicha on turkey basis.

2. Brief facts leading to filing of this writ petition are that respondents No.1 and 2 herein invited tenders by notification published in the newspapers for improvement, design, construction, supply, installation and commissioning of Dairy Plants at Raigarh, Ambikapur, Korea, Kawardha & Jashpur, and Chilling Centres at Bharatpur, Kunkuri & Bagicha on turkey basis. Last date for purchase of the tender form was fixed for 10th February, 2003 upto 14:00 hours. Last date for submission of tenders was 11.2.2003 by 15:00 hours and the tenders were to be opened on 11.2.2003 at 16:00 hours. In response to the said notice inviting tender (NIT), the petitioner herein and respondents

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No.3 & 4 herein, as also two more persons filed their tender documents in time. As per the terms and conditions of the NIT each of the tenderers was required to submit the tender offer in three envelopes namely, A, B and C. In Envelope-A the tenderers were required to submit, (a) A certificate of Registration/Incorporation as approved Contractor; (b) List of contracts undertaken; (c) Completion Certificates of the contracts completed: (d) Income Tax Return: (e) Latest Income Clearance Certificates; (f) Sales Tax/Commercial Tax Clearance Certificate; (g) Copy of Balance Sheet for last two years; (h) Bank's Solvency Certificate; (i) A Certified copy of the partnership deed with certified copy of the Power of Attorney/certified copy of Resolution passed by the board of the company; and (k) Declaration for not involving in any litigation or legal proceedings or black listed with any Government/Public Sector Organization. ***In clause 2 of Annexure-A of the tender form it was further made clear that tenderers not submitting the requisite information along with the tender as above the tender will not be considered and the bid will be rejected.*** In Envelope-B, the tenderers were required to submit tender document duly filled in, terms and conditions involving financial implications, if any, all technical details and specifications, drawing, brochures etc. The third envelope (Envelope-C) was to contain cost of the lump sum offer for the project.

3. The case of the petitioner herein is that respondent No.3 failed to submit bank solvency certificate, experience certificate, list of contracts undertaken and the completion certificate of the contracts completed under turnkey basis which was condition precedent. As in Envelope-A the requisite certificates were not there, respondent No.2 was not entitled to open the Envelope-B of respondent No.3. However, inspite of the objection raised by the petitioner, respondent No.2 opened Envelope-B also of respondent No.3. Envelope-B of respondent No.3 did not contain the tender document form duly filled in and

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signed, which was also a condition precedent, therefore, there was no occasion for respondent No.2 to open Envelope-C, but inspite of the objections and after adjournments on various dates, Envelope-C of respondent No.3 was also opened. Therefore, the main challenge of the petitioner in this writ petition is that respondent No.3 did not submit the requisite experience certificate as also the solvency certificate. In the circumstances, he was not eligible for consideration for awarding the contract. However, in spite of that, respondents No.1 and 2 decided to award the contract to respondent No.3. Therefore, the petitioner by way of this writ petition has prayed for issuance of a writ of mandamus to respondents No.1 & 2 to finalize the tender strictly as per the terms and conditions enumerated in the tender document Annexure P-2.

4. Return has been filed on behalf of respondents No.1 and 2 in which it has been mentioned that since the disputed facts are involved, therefore, the writ petition is not maintainable and since the instant writ petition relates to contractual obligations therefore, the same is not maintainable. It has further been mentioned that all the tender documents were placed for scrutiny before the technical experts for their opinion and that it was on the basis of the opinion received from technical experts that a decision was taken to finalize the tenders and accordingly, the tenderers were called and it was found that respondent No.3 was the competent person to whom the tender could have been awarded. Respondent No.3 being the lowest tenderer his tender document was examined by expert committee as mentioned in para 9 of the return. The Technical Expert Committee on consideration of the document found that if for some reason the participants do not have all the requirements strictly as per the NIT, but they have other experiences in similar fields whose specifications are also competitive and their rates also are found to be proper, the conditions envisaged in the NIT could be relaxed and it was thereafter

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that respondent No.3 was found to be competent. The sum and substance of the return is that after examining the tender documents, the expert committee reached the conclusion that respondent No.3 is the person eligible and they also relaxed certain conditions looking to the overall competence and performance of respondent No.3. Same is the reply of respondent No.3.

5. Rejoinder has been filed on behalf of the petitioner raising the same point and mentioned that the expert committee of respondents No.1 and 2 are not entitled to relax the terms and conditions and eligibility criteria of any tenderer.

6. Additional return has also been filed on behalf of respondents No.1 and 2 in which it has been mentioned that after considering the totality of the circumstances, respondent No.3 was found eligible. It has been admitted that although respondent No.3 had not completed three projects on turnkey basis related with Ministry of Animal Husbandry and Dairy/Food Processing, Government of India, but he completed similar nature of several projects belonging to Maharashtra Government and also in some other places, and on scrutiny by the Technical Committee and technical experts, respondent No.3 was found eligible, and pursuant thereto his tender was also considered. Moreover, only the rates quoted by him were found in accordance with the estimated cost of the project. In this connection, clause 6 of the tender documents at page 27 of the writ petition, it has been mentioned "***No tender shall be acceptable unless all the envelopes "A", "B" & "C" are separately sealed. Tenderer shall not be allowed to fill in or seal their tenders at the DAH & D.*** Tenderers are requested to present the tenders in good time on the stipulated day so as to avoid rush at the closing hours".

7. I have heard learned counsel for the parties.

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8. Learned Senior Advocate Mr. Ravindra Shrivastava argued that since respondent No.3 failed to meet and satisfy the eligibility criteria, therefore, the decision of respondents No.1 & 2 to award the contract in favour of respondent No.3 is arbitrary and irrational, because respondents No.1 & 2 are not entitled to relax the terms and conditions of the tender document unless they have been given any power in the tender document itself regarding relaxation of the terms and conditions of the eligibility criteria.

9. On the other hand, learned counsel for respondents No.1 to 3 submitted that the expert committee examined the documents and found respondent No.3 eligible, and they also found that looking to the cost value offered by respondent No.3 and his experience in other fields he was the most suitable person for award of contract. Therefore, respondent No.3 is eligible for the contract in question and the writ petition is liable to be dismissed. However, they have not pressed about the maintainability of the writ petition on the ground of involving disputed facts in the petition or that the matter relates to contractual nature, therefore, the writ petition is not maintainable.

10. Having heard learned counsel for the parties, I have perused the pleadings, tender form of the NIT, terms and conditions of the NIT, eligibility criteria and other relevant documents.

11. In this connection, as has been mentioned above, the tenderers were required to submit their tenders in three envelopes containing various documents. As per clause 6 of the tender documents at page 27 of the writ petition, the authorities fixed a term that no tender shall be acceptable unless all the envelopes "A", "B" and "C" are separately sealed and the tenderers shall not be allowed to fill in or seal their tenders at the DAH & D. In Clause No.1 - Specific Experience/ Expertise at page 32 of the writ petition it has been prescribed that

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> "The specific experience of designing, construction, supply, installation and commissioning of at least one dairy plant/milk chilling plant on turnkey basis is essential as specified in the NIT. The Tenderers are advised to mention clearly experience of construction as well as experience of supply and erection of Plant and Machinery in Dairy Plant.
>
> Contractors should have completed at least three projects on turnkey basis related with Ministry of Animal Husbandry And Dairying/Food Processing Industries, Government of India and having technically qualified staff in the field of civil, mechanical, electronic/electrical engineering to supervise the work."

Clause 2 of Annexure A at page 57 of the writ petition mentions that

> "Tenderers not submitting the requisite information along with the tender as above the tender will not be considered and the bid will be rejected."

12. If we examine the case of respondent No.3 in the light of the above requirement, it is admitted position that no bank solvency certificate was submitted by respondent No.3. Even the list of contracts undertaken was also not submitted. If we examine the minutes of meeting dated 11.2.2003 of the committee constituted for the purpose of scrutinizing the tender forms, about Envelope-A it has been mentioned that bank guarantee on requisite stamp paper, solvency certificate, the certificate regarding installation and commissioning, and the experience certificate regarding the Animal Husbandry and Dairying/Food Processing were not submitted by respondent No.3. Again in respect of Envelope-B, technical brochures and civil designs were not submitted, and even the original tender form was not returned and conditional tender was submitted by respondent No.3. Even in the additional return these facts have been admitted by respondents No.1 and 2 in which it has been stated that experience regarding execution of three projects on turnkey basis was not submitted and the solvency certificate was also not submitted in the Envelope-A. But, the main ground which has been raised by the

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respondents is that on over all examination of the tender forms, the technical committee reached the conclusion that on the basis of experience of respondent No.3, he was suitable and considering the totality of the circumstances, respondent No.3 was found eligible.

13. Now, the question is whether in the circumstances, respondents No.1 & 2 are entitled to relax the terms and conditions of the contract in spite of the above defects noticed in the bid of respondent No.3. In this connection, the law as has been held by the Apex Court in the matter of **W.B. State Electricity Board v. Patel Engineering Co. Ltd. and others** reported in **(2001) 2 SCC 451**, is as under: -

> "Distribution of State largesse - Government Contracts - Tenders - Rule of law and constitutional values, must be adhered to when awarding contract - Rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favouritism, which are contrary to rule of law and constitutional values - Relaxation by State or its agencies of a rule or condition in favour of a particular bidder, held, not permissible unless expressly provided for in the rules."
>
> "Protection of public interest - Adherence to the rules, held, is the best principle to be followed in the public interest."
>
> "Principle of awarding contract to lowest tenderer, held applies when all things are equal."

It was further held that

> "where bidders who fulfill pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the

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> State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. Such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. Therefore adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest."

14. In the case of **Ramana Dayaram Shetty v. International Airport Authority of India and others** reported in **(1979) 3 SCC 489**, the Apex Court held that

> "Standard of eligibility laid down in the notice for tenders, held, cannot be departed from arbitrarily - Such departure from the standard, held, will amount to denial of equality of opportunity to those who felt bound by the standard of eligibility and therefore did not submit their tenders."
>
> "Relaxation of the standard of eligibility at the time of considering the tenders or applications, held, will amount to a denial of opportunity to those who considering themselves ineligible did not apply."

15. Therefore, in view of the above law laid down by the Apex Court, respondents No.1 & 2 were not entitled to relax the terms and conditions of the NIT. The respondents have not come forward with a plea that in the NIT or terms and conditions of the NIT they have power to relax the eligibility criteria or the experience and other requirements. Since they have no power to relax the terms and conditions of the NIT, the defence of respondents No.1 & 2 that looking to the report of the Expert Committee, also looking to the financial bid of respondent No.3, and looking to the totality of the circumstances, they found respondent No.3 as eligible, is not sustainable. The said decision of respondents No.1 & 2 is arbitrary being irrational and against the rule of law, and they are not entitled to take decision at their whims and fancy. The State and its instrumentalities dealing with the public exchequer are bound to adhere to the rules and terms and conditions fixed by themselves. If they do

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not follow the same, then as per **W.B. State Electricity Board**'s case (supra) and **Ramana Dayaram Shetty**'s case (supra), the said decision of the State and its instrumentalities amounts to discrimination to other tenderers and violative of Articles 14 & 19 (1) (g) of the Constitution of India.

16. As mentioned above, admittedly, respondent No.3 did not submit the solvency certificate and experience certificate regarding execution of three projects of State Government or Central Government and also he submitted conditional tender. In Envelope-B he did not returned the original tender form also and it was submitted thereafter, separately. Looking to these lapses, respondents No.1 & 2 were not entitled to consider the case of respondent No.3, even if his bid was competitive, and they are required to consider other bids, in accordance with law. It is not necessary for them to accept the bid of remaining bidders if they do not find them to be financially viable. They can take further steps in accordance with law.

17. In the result, the petitioner's writ petition is allowed and in view of the above discussion, it is held that respondent No.3 is not entitled for consideration of the said NIT. Vide order dated 10.9.2003 this Court passed interim order that the respondents may proceed with completion of proceedings of tender documents, but they shall not issue work order. Now, that order stands modified in the above term. The respondents can proceed with the process of tender and finalize the tender as per the directions above.

Sd/-
L.C. Bhadoo
Judge

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